## UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

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Plaintiffs,

Case No. 1:18-cv-00950-LO-JFA

v.

COX COMMUNICATIONS, INC., et al.,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO PRECLUDE CERTAIN EXPERT TEXTIMONY PROFFERED BY DR. NICK FEAMSTER

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#### INTRODUCTION

Cox's trial strategy is to parade out a cadre of expert witnesses to distract, sow confusion, and offer opinions untethered to the facts. Its objective is to hide behind experts with extensive resumes, who will tell the jury what to think and how to decide the case. This motion addresses the improper testimony of Cox's proposed expert, Dr. Nick Feamster. He is a computer science professor that Cox hired to rebut the proposed testimony of Plaintiffs' expert, Barbara Frederiksen-Cross.

Dr. Feamster purports to address the MarkMonitor system used to detect infringement, collect evidence, and send notices. But his testimony concerning MarkMonitor and its use of the Audible Magic technology will not assist the jury and should be precluded under Federal Rules of Evidence 702, 703, and 403. Dr. Feamster's challenged testimony is reminiscent of arguments raised in the early days of piracy on the Internet, when practical experience was scarce. He seeks to testify about mere technical possibilities, without regard to the facts of this case or actual probabilities encountered in the real world. Yet theoretical arguments of that sort have been cast aside time and again. Speculation and *ipse dixit* are unreliable, irrelevant, and unfairly prejudicial.

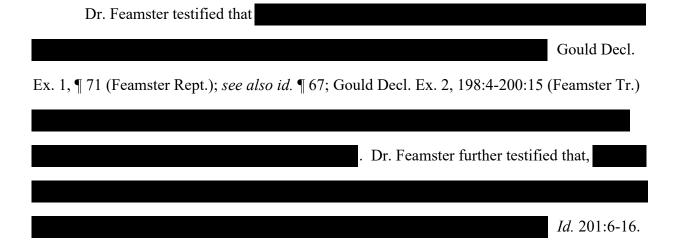
Dr. Feamster's proposed testimony lacks the intellectual rigor required of an expert. The analytical leaps in his testimony are extensive and would substantially confuse a jury about the record evidence. Dr. Feamster makes grandiose statements about the absence of downloads, content identification, and copying, but only because he deliberately refused to consider the key evidence that should have been at the core of his analysis. Likewise, there is no basis to believe that some of the Cox subscribers in the infringement notices used modified BitTorrent software to pretend that they downloaded and were distributing a file not actually on their computers. Similarly, it is improper for Dr. Feamster to opine as to what is necessary to show "true

infringement"—either based on his conjured-up notions of "live reporting" or his desire to rewrite the law to require proof that the Cox user downloaded and distributed "the entire alleged infringing content" rather than 90-100% of the file, which was the threshold used here. The list goes on.

#### **BACKGROUND**

#### A. Dr. Feamster Agrees with Ms. Frederiksen-Cross on the Technical Background

Dr. Feamster's report provides a technical background on Internet technology, peer-topeer file sharing, MarkMonitor, and Audible Magic that actually supports Plaintiffs' case,
reinforcing the underpinnings to Ms. Frederiksen-Cross's opinions. See Decl. of Jeffrey M.
Gould in Supp. of Pls.' Mot. to Preclude Certain Expert Testimony By Dr. Nick Feamster
("Gould Decl.") Ex. 1, ¶¶ 49-127 (Rebuttal Expert Report of Dr. Nick Feamster, Ph.D., May 15,
2019 ("Feamster Rept.")). Dr. Feamster testifies that hash values are unique representations of
the contents of a digital file. Gould Decl. Ex. 2, 186:13-187:11 (Deposition Transcript of Dr.
Nicholas Feamster, Ph.D., May 29, 2019 ("Feamster Tr.")). Two files with the same hash value
should have the same content. Id. 190:7-24.



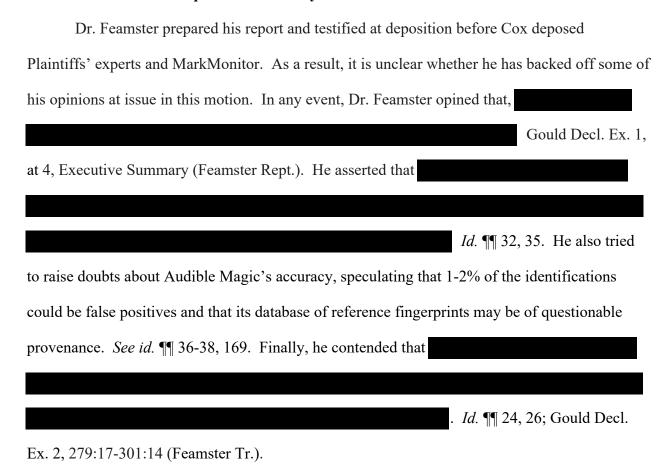
<sup>&</sup>lt;sup>1</sup> Although Dr. Feamster quibbles over some terminology and level of detail, those criticisms of Ms. Frederiksen-Cross are at the margins, at best.

2

In the context of BitTorrent, peers report within a set of data called a "Bitfield" the portions of the content files that they have downloaded and have on their computer for others to download. *See id.* 203:13-204:7. Dr. Feamster did not analyze the Bitfield evidence in this case, nor does he dispute Ms. Frederiksen-Cross's testimony that,

. *See id.* 273:8-279:16.

#### B. Dr. Feamster's Opinions and Analysis



#### **ARGUMENT**

#### I. LEGAL STANDARD

Federal Rule of Evidence 702 governs the admissibility of expert testimony. Under Rule 702, scientific, technical, or other specialized knowledge may be presented to the jury by an

expert witness if: (1) it is potentially helpful to the jury; (2) it is based on sufficient facts or data; (3) it is the product of reliable principles and methods; and (4) the testimony is applied to the facts of the case. Fed. R. Evid. 702. The "touchstone of the rule is whether the testimony will assist the jury." *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011).

Trial courts act as gatekeepers to ensure that expert testimony is reliable and relevant. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). The Court must determine if the "reasoning or methodology underlying the expert's proffered opinion is reliable" and "whether the opinion is relevant to the facts at issue." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 260 (4th Cir. 1999).

The burden is on the party proffering the expert to prove by a preponderance of the evidence that the expert's testimony is admissible and that the requirements of the Federal Rules of Evidence are satisfied. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001); *Daubert*, 509 U.S. at 592 n.10. Rule 403 provides that relevant evidence may still be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

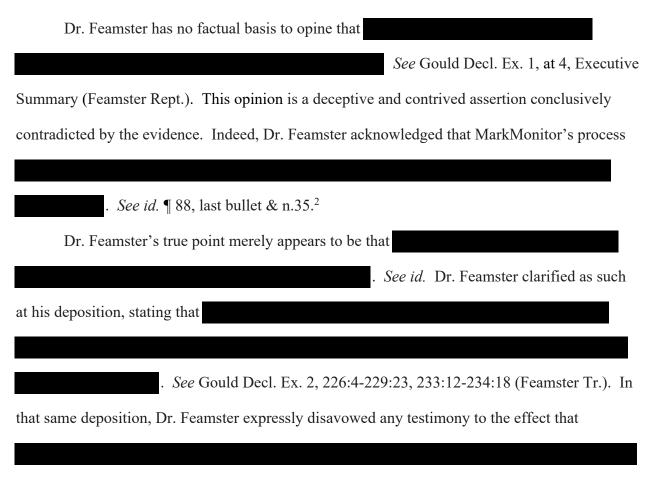
# II. DR. FEAMSTER'S TESTIMONY IS UNRELIABLE, MISLEADING, AND WILL NOT ASSIST THE JURY

The objective of *Daubert*'s gatekeeping requirement is to ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595. "Because of this risk, the judge in weighing possible prejudice against

probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Id*.

Here, Dr. Feamster's testimony regarding MarkMonitor's downloads, MarkMonitor's use of Audible Magic, and the accuracy of Audible Magic is not "a product of reliable principles and methods," let alone ones applied "reliably to the facts of the case." *See* Fed. R. Evid. 702. His testimony does not rest on a reliable foundation nor is it relevant. It is misleading, unfairly prejudicial, will not assist the jury, and should be excluded.

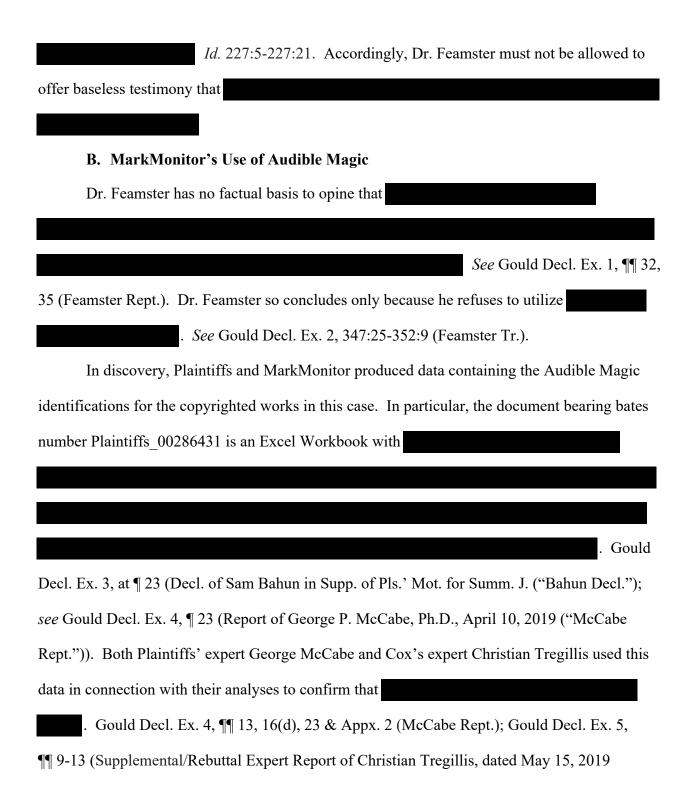
#### A. MarkMonitor's Downloads



<sup>&</sup>lt;sup>2</sup> In addition, MarkMonitor confirmed that

. Gould Decl. Ex. 3, at ¶ 15 (Decl. of Sam

Bahun in Supp. of Pls.' Mot. for Summ. J.).



("Tregillis Rept.")).<sup>3</sup> This evidence conclusively demonstrates that MarkMonitor matched every work at issue in this case by using Audible Magic.

Dr. Feamster inexplicably casts this evidence aside. Only by burying his head in the sand was Dr. Feamster able to opine that He relied solely on a spreadsheet . See Gould Decl. Ex. 2, 204:8-210:5, 347:25-352:9 (Feamster Tr.). Cox did not show , and thus the spreadsheet was *never authenticated or* explained.<sup>4</sup> See id. 210:6-24. Audible Magic testified that . Gould Decl. Ex. 6, 173:21-177:19 (Rule 30(b)(6) Deposition Transcript of Vance Ikezoye for Audible Magic, dated May 6, 2019 ("Audible Magic Tr.")). Audible Magic testified that . *Id*. 138:6-144:3, 175:8-178:11. Giving up the game, Dr. Feamster concedes that, See Gould Decl. Ex. 1, ¶ 33 (Feamster Rept.). At trial, Dr. Feamster must not be allowed to confuse and mislead the jury with the specious contention that there is an absence of Audible Magic identifications for the works in suit, while another Cox

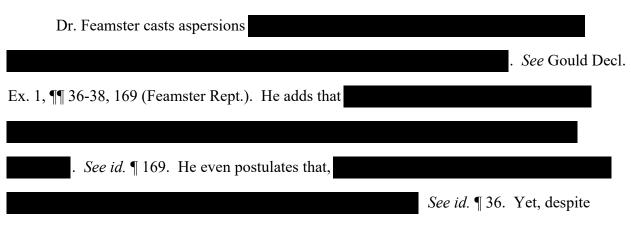
<sup>&</sup>lt;sup>3</sup> Plaintiffs\_00286431 and Plaintiffs\_00286281 are the same document, except that Plaintiffs\_00286431 contains additional metadata requested by Cox.

<sup>&</sup>lt;sup>4</sup> The unexplained spreadsheet

expert, Mr. Tregillis, uses the very "absent" Audible Magic identifications in his analysis. The evidence that Dr. Feamster inexplicably disregards conclusively sets forth the Audible Magic identifications for the works.

Dr. Feamster's analysis patently fails to meet any of the *Daubert* requirements. It is not based on any reliable methodology or the facts in the case. He should not be able to walk into court to say there is no evidence when his "basis" for saying so is nothing more than a stubborn refusal to look at the actual evidence.

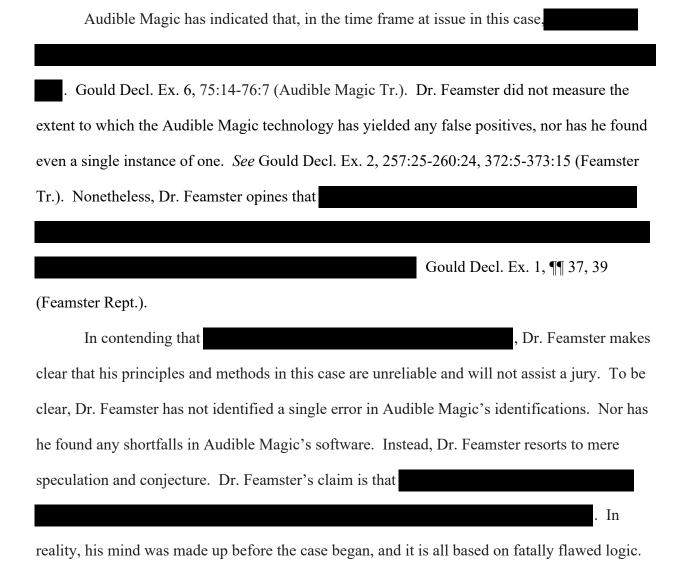
#### C. Accuracy of Audible Magic



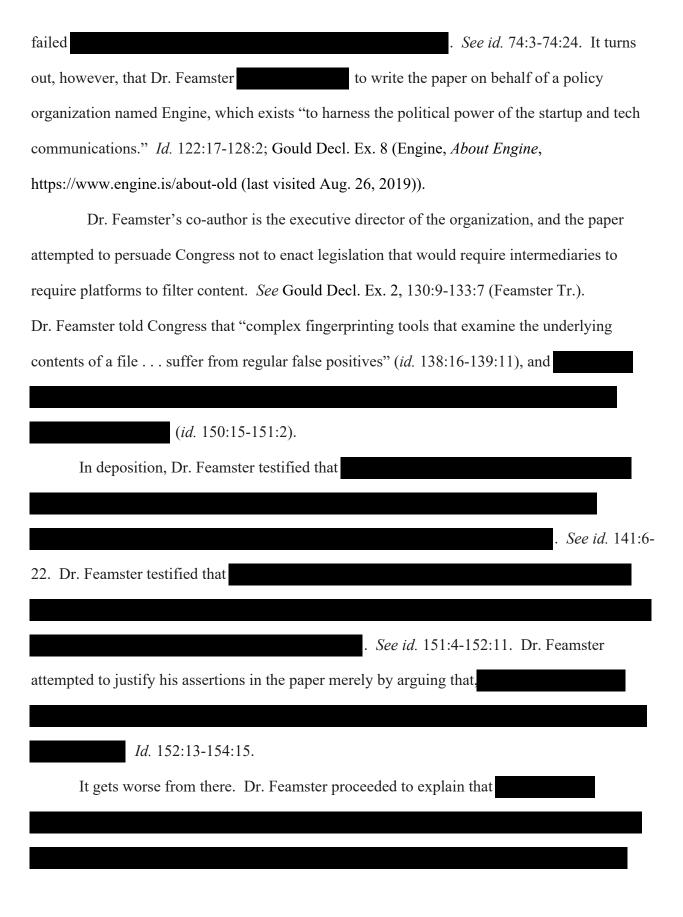
having access to all of the evidence in this case, none of Dr. Feamster's testimony on Audible Magic is based on any of that evidence or any analysis of Audible Magic. His testimony on Audible Magic is unreliable, purely speculative, and should be precluded.

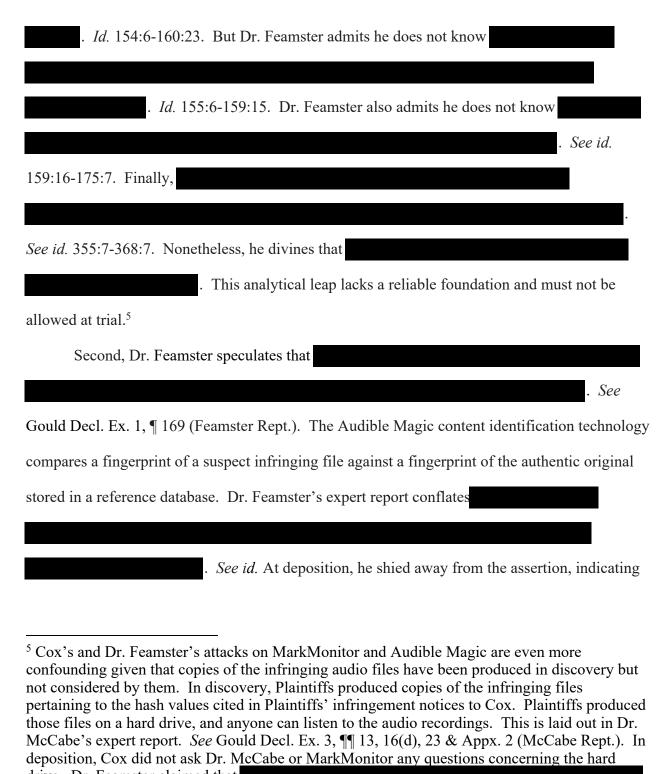
First, in matters stretching well over a decade, numerous courts have recognized the use of the Audible Magic software as a proper method to match an infringing file with a copyrighted work. *See*, *e.g.*, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1012 (9th Cir. 2013) ("Audible Magic's technology takes audio 'fingerprints' from video files and compares them to a database of copyrighted content provided by copyright holders."); *Capitol Records, LLC v. Escape Media Grp., Inc.*, No. 12-cv-6646 (AJN), 2015 WL 1402049, at \*23 (S.D.N.Y. Mar. 25, 2015); *Arista Records LLC v. Myxer Inc.*, No. CV 08-03935 GAF (JCX),

2011 WL 11660773, at \*5 (C.D. Cal. Apr. 1, 2011); Arista Records LLC v. Lime Wire LLC, No. 06 Civ. 05936 KMW, 2010 WL 10031251, at \*6 (S.D.N.Y. Aug. 9, 2010); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1205-06 (C.D. Cal. 2007). Dr. Feamster's speculation and theoretical possibilities constrained none of these decisions.



Years ago, Dr. Feamster reviewed an audio fingerprinting technology called Echoprint in connection with an advocacy paper he co-authored entitled "The Limits of Filtering." *See* Gould Decl. Ex. 7, Ex. 149 (Evan Engstrom and Nick Feamster, Engine, *The Limits of Filtering: A look at the Functionality & Shortcomings of Content Detection Tools* (March 2017)). Dr. Feamster





drive. Dr. Feamster claimed that

Gould Decl. Ex. 2, 234:19-245:21, 251:5-257:5 (Feamster Tr.). Yet, had Dr. Feamster compared the file sizes in the documents bearing bates number Plaintiffs\_00286431 ("Audible Magic Data") and Plaintiffs\_00286432 ("Download Data"), both of which were used by Dr. McCabe and Mr. Tregillis, he would have found the files matched the sizes of the files on the hard drive. *See* Gould Decl. Ex. 3, ¶¶ 23-24 (Bahun Decl.); Gould Decl. Ex. 4, ¶¶ 23, 27 (McCabe Rept.); Gould Decl. Ex. 5, ¶ 13 (Tregillis Rept.).

Gould Decl. Ex. 2, 373:16-380:22 (Feamster Tr.). He should not be allowed to offer this confused testimony and speculation at trial. Third, Dr. Feamster speculates that the . He contends that Gould Decl. Ex. 1, ¶ 36 (Feamster Rept.). Of course, Dr. Feamster is not allowed to testify about what amounts to "true infringement" under the law. The Court instructs the jury on the law, not Dr. Feamster. Nor does he have any grounds to believe that the downloads and distributions in this case have anything to do with This testimony, which is speculative and not tied to the actual evidence in the case, must be precluded. D. Pretextual Reasons for Demanding Contemporaneous Downloads Dr. Feamster offers several improper arguments for why See Gould Decl. Ex. 1, ¶ 24 (Feamster Rept.). None of Dr. Feamster's rationales has a factual basis in this case. Litigation exists in a world of probabilities. His academic theory, without application to the evidence, is irrelevant. It also conflicts with the law. First, Dr. Feamster contends that *Id.* ¶¶ 24, 26 (Feamster Rept.). But Dr. Feamster's testimony is premised on an improper legal assumption: that there is no infringement unless has 100% of the infringing file on their computer. The law

that there is no infringement unless has 100% of the infringing file on their computer. The law says otherwise. *See*, e.g., *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1034 (9th Cir. 2013) (affirming grant of summary judgment for infringement on BitTorrent). Dr. Feamster's

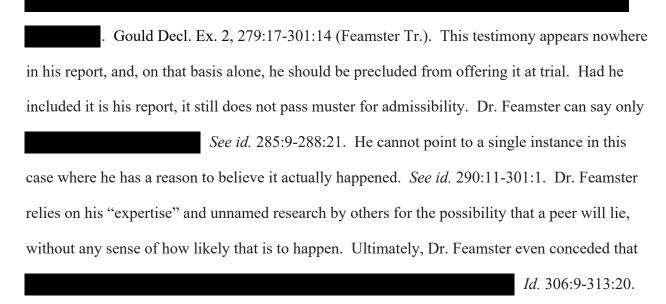
opinion also completely ignores the evidence. The uncontested evidence shows that the Cox subscribers that MarkMonitor reported for infringement had 90-100% of the infringing file.

Moreover, BitTorrent works by breaking files into pieces and, per Dr. Feamster, individuals

Gould Decl.

Ex. 1, ¶ 76 (Feamster Rept.). Dr. Feamster must not be allowed to attempt to offer this testimony, improperly aimed at jury confusion.

Second, Dr. Feamster offers conjecture that,



There is no reason to believe that such inaccuracy occurred here.

#### **CONCLUSION**

For the reasons set forth herein, pursuant to Rules 702, 703, and 403, Dr. Feamster should be precluded from contending that the files in Plaintiffs' infringement notices to Cox did not contain copies of Plaintiffs' sound recordings and musical compositions. In particular, Dr. Feamster should be barred from:

(1) Testifying that

- (2) Testifying that ;
- (3) Testifying against
- (4) Testifying that proof of infringement (whether reproduction or distribution) requires a contemporaneous download at the time of each infringement notice and/or that the alleged infringer has 100% of the infringing file.